It’s Urgent III

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10 September 2020 was a watershed moment for the Court of Justice’s independence: the Court, through its Vice-President, has agreed to dismiss its own sitting member without even notifying her of the appeal against the suspensory order protecting her tenure guaranteed in the EU Treaties. It did so by arguing, effectively, that the Member States could dismiss members of the Court at will, and that such decisions were beyond judicial review: AG Sharpston’s fight for the independence of the Court, according to that very Court through its Vice-President, had ‘prima facie’ ‘no prospect of success’ (para. 29 of both orders *infra*).

What happened on 10 September 2020?

Without formal prior notice, or publicity that appeal proceedings were brought against the Order of Judge Collins (Act II of the drama), on the morning of 10 September 2020, the Vice-President of the Court of Justice, Judge Rosario Silva de Lapuerta delivered two Orders (Case C-423/20 P(R) and C-424/20 P(R)), setting aside the Order of Judge Collins of 4 September 2020. AG Sharpston was thus dismissed, *à l’hongroise* (paras. 62 and 79) *et à la polonaise* (para. 40), notwithstanding the tenure term set in the EU Treaties, thus in direct breach of Article 253 TFEU.

The day after the Order of Judge Collins was made, on 5 September 2020, both the Council and the Representatives of the Governments of the Member States lodged an appeal against the Order of Judge Collins. The appeal was lodged *ex parte*. No notice of this appeal was given to AG Sharpston. The first time AG Sharpston heard of the mere existence of the appeal that was brought was when the Vice-President set aside the Order of Judge Collins on the morning of 10 September 2020, whilst her replacement was being sworn into office. AG Sharpston was not presented with an opportunity to present written or oral argument before the Court of Justice on anything at all.

In absence of AG Sharpston, but in the presence of Mr. Rantos, as Luxembourgian *Paperjam* reports, the Vice-President of the Court of Justice ruled that the appeal brought by the Council and Representatives of the Governments of the Member States was admissible. This Order of the Vice-President was without mentioning that the Order of Judge Collins was not final, or taking account of the reasonable deadline that he set, within his mandate as per Article 157(1) of the Rules of Procedure of the General Court, for the respondents to submit observations set for 11 September 2020 had not even expired.

The Vice-President ruled that AG Sharpston did not have a ‘prima facie case’ in relation to the main case in which the ‘interim interim’ measures Order by Judge Collins had been issued (para. 22 of both Orders). She found that Judge Collins erred in law (para. 29 of both Orders) since the act in question under Article 253

TFEU was adopted by the Representatives of the Governments of the Member States and not the Council of the European Union (para. 24 of both Orders) on the assumption that no case can, *per se*, be brought against the decisions of the Member States not meeting in Council or the European Council. This was apparently deemed to be the case, even in the context, like that of the case of AG Sharpston, where such Representatives expressly lack the clear and precise competence to act conferred on them by the EU Treaties. Vice-President Silva de Lapuerta thus ruled as if Article 253 TFEU did not require *expressis verbis* that the appointments be done for 'six years'. The six-year mandate of the members of the Court, as Vidigal points out, is not 'until the [Member States] decide otherwise'.

Moreover, found the Vice-President, the acts of the Representatives of the Governments of the Member States could not be subjected to judicial review, given they fall outside the scope of Article 263 TFEU (para. 28 of both Orders). To reinforce her claim of *prima facie* inadmissibility, the Vice-President further relied on *Parliament v. Council and Commission* (C-181/91 and C-248/91) to claim that 'representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the courts of the Union' (para. 26 of both Orders). The argument however appears faulty on the face of it, since the Representatives of the Governments of the Member States would obviously be limited to appointing 11 Advocates General, as Judge Collins rightly pointed in his Order. In the absence of a vacancy, the Representatives of the Governments of the Member States cannot legitimately refer to Article 253 TFEU to appoint yet another Advocate General if the consequence is undoing the previous appointment, in direct breach of the six-year term of office established by that very provision.

In other words, the Vice-President failed to make clear that the Representatives of the Governments of the Member States simply *did not have the power* to appoint any Advocate General legally using Article 253 TFEU without the direct breach of the EU Treaties, as long as a vacancy has not arisen, which was the case at issue. The reasoning offered by the Vice-President thus authorises abuse of power by the Member States in the cases where the scope of action taken by their common accord should be very specific and clearly articulated in the EU Treaties. Under Article 253 TFEU, Member States are acting in a capacity that the EU Treaties give them the competence to do so, and is not just an exercising of *ad hoc* actions outside of the EU legal framework. Certain of the Court's powerlessness in the face of an *ad hoc* decision of the Member States not called for by Article 253 TFEU and, indeed, taken in direct breach of this provision, the Vice-President took the final decision to set aside the 'interim interim' measures Order of Judge Collins (paras. 31-36 of both Orders).

In essence, this means that no substantive decision has been reached in the cases launched by AG Sharpston in front of the General Court, even though the abuse of Article 253 TFEU procedure by the Member States and the neglect of the clear guarantee of AG mandate established by the same provision, has had an upper hand for now. Eventually it is theoretically possible that the General Court could thus consider whether AG Sharpston's dismissal was unlawful or not, but very difficult,

given the finding of the Vice-President of no *prima facie* case in the first place. Moreover, the practical consequences for the independence of the Court of Justice cannot at this point be undone and are difficult to pin-point. This is because removing her successor from the bench would hardly be possible: exactly the situation with the Pyrrhic victory of the Commission in *Commission v. Hungary (Judicial Retirement)*, in the absence of effective interim measures to ensure that such situations never arise as demonstrated, for example, in *Commission v Poland (Independence of the Supreme Court)*. Indeed the only way for the newly-installed AG Rantos to be removed would be for members of the Court to do so, in accordance with the strict rules contained in the Statute of the Court (or shockingly, via another unreviewable act by the Member States in breach of a six-year mandate).

Core problems of the Orders of the Vice-President

Let us walk through a selection of flaws in Vice-President's reasoning. To single out just a few of the most significant ones, we focus on the following: (1) The decision of the Vice-President is based on a presumption repugnant to primary law, which consists in the lack of independence of the Court of Justice and non-applicability of the principle of irremovability to the members of the Court. This presumption is flawed and does a lot of harm to the institution. (2) The presumption is coupled with the erroneous assumption of Member States' impunity in undermining independence of the Court of Justice, even in the cases of direct violation of the provisions of primary law on the security of tenure, when their actions not called for by the EU Treaties and undoing primary law guarantees are taken to be unreviewable. (3) The fact that AG Sharpston was not even notified of the appeal, while AG-to-be Rantos was sitting in the room, is just one in a line of violations of the core principles of procedural justice and fairness enshrined in Article 47 of the Charter giving the whole affair an unusual sense of injustice. (4) The Order of the Vice-President was issued with grave procedural violations and the lack of any urgency is obvious. The result is a harmful farce of a situation, as opposed to reaching sound conclusions after a proper hearing on the pending interim measures proceedings before the General Court. Moreover, the Orders seem to be capable to amount to *de facto* deciding the case on the merits while hearing an appeal against a provisional interim measure.

Point 1) The Starting Assumption: The lack of independence of the Court of Justice

Instead of striving to ensure that the Court of Justice meets the high standard of judicial independence and irremovability of judges established in its case law, the Vice-President has precisely renounced to those principles, which the Court has otherwise been quite successful in elucidating in a line of recent judgments that we discussed in Act I. This unceremonious affair through the Orders of Vice-President Silva de Lapuerta has confirmed that members of the Court of Justice can be removed from office by the Member States, at will, through an action such as the one taken to remove Advocate General Sharpston from office, and install Mr. Rantos in her place.

The fact that the Vice-President in essence argues that there is no appeal against the decision of the Member States taken on foot of Article 253 TFEU, which the EU Treaties empower them to make by common accord, even when such a decision is uncalled for. The Orders curtail of the promise of *Les Verts* – one of the Court's most celebrated judgments – let alone have regard to all the recent case law of the Court of Justice on judicial independence. The Order of the Vice-President can be seen to be in direct contradiction with the terms of the mandate set in the EU Treaties. These developments drastically undermine the judicial independence of the Court of Justice.

Point 2) The Assumption that Member States can violate the EU Treaties with impunity

A related assumption that the Member States can appoint members of the Court in direct violation of Article 253 TFEU by breaching both the security of six year tenure and ignoring the lack of a vacancy on the Court required to invoke Article 253 TFEU in the first place. This has the potential to undo any idea of judicial independence in the EU: not a situation in line with the rule of law, thus reminiscent of Hungary and Poland, not of the EU as a whole, pointing in the direction of letting the 'Masters of the Treaties' to dwell beyond the law.

The Vice-President of the Court of Justice took a very strict reading of whom comes within the scope of a judicially review act on the basis of the normal action for annulment procedure under Article 263 TFEU. The Representatives of the Governments of the Member States appear, thus far, to be beyond the ability of judicial review of the Court. But this cannot be correct. The actions of the Member States in this instance are, after all, *procedural* irregularities that can be subject to judicial review. It is not about, and has never been about that of the person to whom has been appointed, which would quite obviously fall within the political question doctrine. Moreover, further damage of the Court's short-sighted approach could be mitigated by the initiating of proceedings in a national court of Member States against a particular government, as one component of the decision-maker of the Representatives of the Governments of the Member States occur as Professor Platon suggested to us. The room for optimism here is limited, but it is an avenue. When faced with such a question, the national court could make a request for a preliminary reference under Article 267 TFEU to the Court of Justice, asking whether the Court of Justice is validly and lawfully composed, or other associated questions arising from this entire saga.

Yet, the very idea that the Council on the one hand; and the Representatives of the Governments of the Member States on the other hand; are separate entities in entirely fictitious. For all intents and purposes, and in reality, they are one-in-the-same. This can be analogised to the situation arisen in *NF v European Council*. There, the 'EU-Turkey Statement' was found to be beyond a judicially reviewable act at first instance, and the less-than-promising read in that case which could not attribute an action to the European Council, even though in reality, it was. However, it has been alluded to by the President of the Court in an essay to honour

a former colleague (page 10), that there is nothing in principle from the Court of Justice through another procedure, of such a case coming before the Court again, reviewing whether such activity can be judicially reviewable, and better deciphering what is an act within the scope of judicial review by the Court of Justice.

The apparent lack of judicial reviewability of actions of the Member States that are either sanctioned by, or have effects on the EU legal order, we contend, is not a settled question in EU law, and is still up for debate in order for judicial review to be found in appropriate instances, like the situation of AG Sharpston. There will be one day in which the Court of Justice will have to take the necessary steps towards ensuring that such decisions, when they affect the workings of EU institutions, are brought within the proper scope of judicial control.

Point 3) Violation of Article 47 CFR. What should have happened in a constitutional system based on the rule of law

The Rules of Procedure of the Court of Justice (CJEU RoP) state in Article 160(5) that '[t]he application shall be served on the opposite party, and the [Vice-] President shall prescribe a short time limit within which that party may submit written or oral observations'. This did not happen for AG Sharpston. Whilst Article 160(7) states that the Vice-President 'may grant the application even before the observations of the opposite party have been submitted', it would appear that the only reason that this would happen is for reasons of exceptional urgency. This was not the situation in this case.

In last week's Order of Judge Collins, the defending parties to the proceedings were given one week, until 11 September 2020, to lodge their written submissions to the General Court. This was so that the presiding judge of the General Court could fully adjudicate on the application for interim measures, pending a case full on the legality of the appointment made by the Member States, as per the ordinary course of events in Case T-550/20. The Rules of Procedure of the General Court permit a case to be expedited on an application to the Court, which the applicant made.

The sensible solution of Judge Collins ensured that the defending parties, the Council and the Representatives of the Governments of the Member States had the possibility to submit written observations, and guaranteeing the rights of all parties of their rights of Article 47 of the CFR. Instead, however, rather than submit written observations, the Member States went ahead and appealed the Order of Judge Collins to the Court of Justice of the European Union, asking for that Order to be set aside. However, the actual interim measures proceedings had not yet been concluded, as Judge Collins was still seized of the interim measures application.

When initiating their appeal, the Member States had requested that the Vice-President of the Court of Justice rule on the appeal against the Order of Judge Collins without hearing AG Sharpston (paragraph 10 of both Orders). The Vice-President of the Court of Justice could have acted in a similar way to Judge Collins,

given that she was now seized of an appeal of an ‘interim interim’ measure. Vice-President Silva de Lapuerta could have made an Order to the effect that the legal team of AG Sharpston were given a similar seven-days to lodge their written response to the appeal brought against the Order of Judge Collins. Regrettably, and in violation of Article 47 CFR, she did not do so, and the Court of Justice never got to see AG Sharpston’s legal position as regards the Order of Judge Collins.

Prima facie, there was no compelling reason for the Vice-President to act the way in which she did, given that the interim measures proceedings were still pending before Judge Collins. We initially titled Act I of this drama as ‘it’s urgent’, given that the speed at which the Member States attempted to appoint a new Advocate General was quite striking. The urgency that existed for Judge Collins issuing his Order did not apply to Vice-President Silva de Lapuerta issuing her Orders. The issue after Judge Collins issued his Order, therefore, lost urgency, and Vice-President Silva de Lapuerta should have rightly dismissed the appeal, letting the Order of Judge Collin’s stand whilst he was still seized on the interim measures application, for which he had not yet delivered his final interim measures decision.

It was not necessary for the speed at which Mr. Rantos entered into office as an Advocate General and member of the Court to proceed in such a rushed manner. The Vice-President of the Court of Justice acted, just like the Member States, with unnecessary haste. Article 47 CFR states that ‘[e]eveyone shall have the possibility of being advised, *defended* and represented’, as analysed extensively by Pech. It is submitted that AG Sharpston’s rights to be defended were not respected, given that the Order of Vice-President Silva de Lapuerta has, in effect, resulted in the entering into office of Mr. Rantos as Advocate General, thus depriving her of her office (and the Court of its independence).

Point 4) Abuse of the interim measures procedure

The outcome is extremely near-sighted. With the current interim measures application now set aside through the Orders of the Vice-President in Cases C-423/20 P(R) and C-424/20 P(R), the case that AG Sharpston lodged on 4 September 2020 (Case T-550/20) now returns to the General Court to be heard on the merits of the substantive case. The General Court will now have to decide whether to grant the application of AG Sharpston for the case to be accelerated, but this is unlikely. Through the Orders of the Vice-President, and the secret, swiftly arranged swearing-in of the new Advocate General to replace her, her pending cases have now lost the trust of what their outcome was set to achieve – her remaining in office, in line with her mandate guaranteed by the EU Treaties. It is tantamount to deciding the entire substance of a case on an interim measures cases. As reported by Joshua Rozenberg, the Vice-President of the Court of Justice has ‘purported to decide the entire case on an *ex parte* application against an *ex parte* freezing order’.

In terms of immediate effects, her cases (Case T-180/20, Case T-184/20, and Case T-550/20) are now a *fait accompli*. Yet the General Court can still decide itself on the legality of the various actions that AG Sharpston has challenged – the declaration of

the Representatives of the Governments of the Member States, dated 29 January 2020 (Case T-180/20); the decision of the President of the Court of Justice of 31 January 2020 to declare a vacancy on the Court and to initiate the procedure for the appointment of a successor; and the decision of the Representatives of the Governments of the Member States to appoint a new Advocate General (Case T-550/20). Individually or collectively, these three cases now offer the General Court, in a well-thought out, and clearly reasoned way, how it believes such cumulative procedural flaws in the EU legal order can, and must be corrected. When the case is appealed to the Court of Justice, which the losing party will, they too ought to ensure that such basic flaws are corrected, to prevent any irregularities like the ones seen in these three Acts from every happening again.

Long-term implications

Normally, a new member of the Court entering into office is a wonderful occasion for the person concerned. It is done is an open, public manner, with celebrations to mark the occasion. They are on occasion even streamed online on the Court's website. This affair, however, marks a stark contrast to the norm, in which the swearing into office of a new member of the Court happened under cloak-and-dagger, with extensive administrative cooperation in the background so that the new Advocate General could enter into office immediately after the Orders of the Vice-President were delivered on the morning of 10 September 2020.

What the Orders of the Vice-President of the Court of Justice have done is effectively licence and sanction any of the members of the Court, including judges, to be removed from office at the will of the Member States through actions on the basis of Article 253 TFEU. Make no mistake – what has occurred here in this affair is the Member States successfully sacking a member of the Court. AG Sharpston's tenure as a member of the Court has been terminated in a way that is not as explicitly set down in the EU Treaties and Statute of the Court. The question therefore has to be: why did the Court, through the Orders of the Vice-President on 10 September 2020, let this happen? To this, we have no straightforward answer. Yet how can the 'principle of irremovability' that the Court has been using in its judgments of late continue to be used as a ground for reasoning when the Court's own members do not possess the same protection for irremovability?

Even if Strasbourg could be an option to further try to defend the basic tenets of independence of the Court of Justice, the track record of the European Court of Human Rights (ECtHR) in substance on such cases is quite weak as Kosa# and Šipulová explain, many a victory of the illegally dismissed prominent court member notwithstanding. Crucially, the ECtHR does not demand the restoration of the *status quo ante*, which means that the illegally dismissed court members cannot regain office in the context where the security of tenure, precisely, it the crux of the matter. However, the ECtHR also has case law that justice must not only be done, but it also must seem to be done. In this sense, it is difficult to claim that justice was seen to be done to AG Sharpston.

As parties that instigated these events, the Member States must hang their head in shame. Separately, the Court of Justice has failed to protect one of its own members. A tragic drama that, as custom, culminates in a tragedy. Kumm is absolutely right: ‘Courts are not simply engaged in applying rules or interpreting principles. They assess justifications’ (at 144). This is something that the Vice-President has not done. Worse still, the Vice-President foreclosed any serious conversation in the absence of the navy and the army. The only weapon that the Court of Justice has is the clarity of the argument and the ability to be crystal clear and absolutely convincing. There is simply nothing else in stock. The Orders of the Vice-President are truly a low point on this count.
